

THE EFFECTS OF BROWNFIELD POLICY AND DEVELOPMENT: DISPARATE IMPACTS AND THE MIDWEST

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Abstract: The current framework of many brownfield programs increases the likelihood of discrimination in urban areas across the United States. This note analyzes the racial and economic impacts of brownfield policy and suggests that the current system does not adequately protect against discrimination within classes of low income, minority populations. In the early 1990s, the EPA and federal government identified the risk of discrimination and accordingly refined their approach to brownfield redevelopment. Nonetheless, the implementation of many current brownfield programs is still flawed. Comparing policies among several Midwestern cities has shown that proper brownfield methodology can achieve both nondiscriminatory economic development and environmental renewal within communities. Mainly, a successful brownfield redevelopment program should include community-wide involvement, legislative clarity, and uniformity among regulators.

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I. INTRODUCTION

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Following the industrial boom in the first half of the 20th century, thousands of buildings and facilities became either obsolete or infeasible. Not surprisingly, many of these properties fell into disrepair and were wholly abandoned leaving uncertain levels of contamination behind in the form of brownfields.¹ The Rust Belt from Chicago and Indianapolis to Detroit and Cleveland suffered the brunt of the exodus as manufacturing declined while outsourcing increased.² Nationwide, the exact number of brownfields is unknown.³ However, the National Brownsfield Association estimates as much as “20 to 50 percent of all industrial properties may be underdeveloped because of the presence of contaminants,” which is roughly equal to \$2 trillion in real estate nationwide.⁴ Potentially 400,000 to 1 million of the aforementioned underdeveloped properties qualify as brownfield sites.⁵

In the wake of abandonment and contamination, the Environmental Protection Agency (EPA) proposed and initiated a brownfield redevelopment program.⁶ Even before that time, there were numerous initiatives and voluntary cleanup programs at the state level. The EPA’s brownfield program created national cooperation and federally sponsored grant incentives to encourage remediation and development of these abandoned sites. The Midwest was the first region to embrace the brownfields program and implement legislation at the state level.⁷ By 2001, all but two states, North and South Dakota, had established a brownfield program.⁸ Currently, all fifty states have some level of brownfield redevelopment programs.⁹

For management purposes, the EPA divided the United States into regional environmental groups. Michigan, Ohio, Indiana, Illinois, Wisconsin, and Minnesota

1. Black’s Law Dictionary defines a brownfield site as “[a]n abandoned, idled, or underused industrial or commercial site that is difficult to expand or redevelop because of environmental contamination.” BLACK’S LAW DICTIONARY 206 (8th ed. 2004).

2. RON HIRA & ANIL HIRA, *OUTSOURCING AMERICA: WHAT’S BEHIND OUR NATIONAL CRISIS AND HOW WE CAN RECLAIM AMERICAN JOBS* 135 (Am. Mgmt. Ass’n ed., 2005).

3. Amy Pilat McMorrow, *CERCLA Liability Redefined: An Analysis of the Small Business Liability Relief and Brownfields Revitalization Act and Its Impact on State Voluntary Cleanup Programs*, 20 GA. ST. U. L. REV. 1087, 1100 (2004).

4. David Biederman, *(Re)building for the future*, JOURNAL OF COMMERCE WEEKLY, June 11, 2007, at 14.

5. *Id.*

6. Brownfields and Land Revitalization, <http://www.epa.gov/brownfields/about.htm> (last visited Nov. 3, 2007).

7. Brownfields Assessment Pilot Fact Sheet, <http://www.epa.gov/brownfields/html-doc/cleveland.htm> (last visited Feb. 22, 2008).

8. Charles Bartsch & Rachel Deane, *Brownfields “State of the States”: An End-of-Session Review of Initiatives and Program Impacts in the 50 States*, 71,88 (Northeast-Midwest Institute 5th ed. 2002), available at http://www.nemw.org/brown_stateof.pdf (last visited Feb. 1, 2008).

9. Brownfields Assessment, Cleanup and Revolving Loan Fund Pilots/Grantees, <http://www.epa.gov/brownfields/plocat.htm> (last visited Feb. 1, 2008).

comprise Region Five.¹⁰ Region Five, as leaders in brownfield redevelopment, incorporated two vital elements into their programs that make brownfield redevelopments feasible. First, financing and tax incentives promote the economic redevelopment of blighted, contaminated properties.¹¹ Second, immunity from statutory liability encourages the environmental cleanups of contaminated properties.¹² Ultimately, those two elements promote urban renewal, curb sprawl, and create a more sustainable environment. However, these incentives alone have not always been successful.

Although the EPA intended brownfield programs to create economic and environmental benefits, some allege the programs have the opposite effect.¹³ The driving force behind these allegations is the premise that polluted, toxic properties are often, and more likely than not, located in low-income, inner city neighborhoods.¹⁴ As a result, brownfield policy often creates a disparate impact on urban neighborhoods by increasing the economic inequality between income groups and discouraging full remediation of environmental threats.

This note discusses the potentially discriminatory, ill effects of brownfield programs, with a focus on Midwestern states. Part II will discuss Title VI of the Civil Rights Act and the EPA's guidance on the issue. Part III will analyze the effects of brownfield programs and the disparate impacts they create. Finally, the note will propose several modifications to the current brownfield redevelopment scheme that may lessen the discriminatory effects.

II. BACKGROUND

A. Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act protects persons from discrimination by government agencies and other programs that receive financial assistance from the federal government.¹⁵ Title VI specifically states, “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or

10. U.S. Environmental Protection Agency, *PARTNERING FOR REDEVELOPMENT*, <http://www.epa.gov/brownfields/news/bfstakesec4.pdf> (last visited Feb. 1, 2008).

11. Charles Bartsch, *Redeveloping Brownfields: Evaluating the Program and Looking to the Future*, 37 BNA ENV'T. REP. 206 (Jan. 27, 2006).

12. Gabriel A. Espinosa, *Building on Brownfields: A Catalyst for Neighborhood Revitalization*, 11 Vill. Envtl.L.J. 1, 10 (2000); *see also* 42 U.S.C. § 9607(b) (2000) (providing liability relief through the Comprehensive, Liability Act of 1980 (CERCLA)).

13. *See* U.S. Environmental Protection Agency, *Report of the Title VI Advisory Committee*, <http://www.epa.gov/ocem/nacept/titleVI/titlerpt.html> (last visited Feb. 1, 2008).

14. Bradford C. Mank, *Reforming State Brownfield Programs to Comply with Title VI*, 24 HARV. ENVTL. L. REV. 115, 139 (2000).

15. 42 U.S.C. § 2000d (1964).

activity receiving Federal financial assistance.”¹⁶ The legislature limited Title VI’s application to “program[s] of activities in areas receiving Federal financial assistance.”¹⁷ This is a very broad standard, and virtually all state level environmental programs, including brownfields, fall within this scope. Therefore, brownfield projects that receive federal funding or environmental permits through a federally funded state agency cannot “have an unjustified disproportionate and discriminatory effect on minority residents.”¹⁸ If there is a discriminatory effect, the EPA may revoke funding or otherwise take action against the brownfield project.¹⁹

President Clinton took an additional step forward in an early 1990’s executive order to ensure that the EPA and other agencies, address Title VI in their programming. Clinton’s order required the EPA to achieve “environmental justice . . . by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations”²⁰ This language brought new concerns as to the feasibility of brownfield redevelopments, particularly those in low-income areas. Clinton’s declaration created a risk that plaintiffs could bring Title VI discrimination claims in an environmental context.

Title VI protects against both intentional discrimination and discriminatory effects.²¹ Generally, environmental justice advocates rarely use the fact-intensive intentional discrimination grounds.²² Rather, Title VI’s cause of action for discriminatory effects creates many more opportunities for litigation and in turn, creates a potential for a chilling effect on brownfield redevelopment.²³ The main “discriminatory effects” weapon is an allegation of a development’s disparate impact. Although a precise definition of disparate impact is difficult to discern, the term generally includes any action that adversely effects minority or low income populations.²⁴

B. Reaction to Title VI: The EPA’s Interim Guidance

16. *Id.*

17. *Id.*

18. Michael D. Mattheisen, *The U.S. Environmental Protection Agency’s New Environmental Civil Rights Policy*, 18 VA. ENVTL. L.J. 183, 203 (1999).

19. National Governors Association, *How Smart Growth Can Address Environmental Justice Issues* (2001), <http://www.nga.org/cda/files/052201ENVIROJUS.pdf>. (last visited Feb 1, 2008).

20. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

21. 42 U.S.C. § 2000d-1(1964).

22. See Julia B. Latham Worsham, *Disparate Impact Lawsuits under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 B.C.ENV. AFF. L. REV. 631, 640-42 (2000).

23. Melva J. Hayden, *A Perspective on the Environmental Protection Agency’s Title VI and Environmental Justice Programs*, 10 FORDHAM ENVTL. L.J. 359, 364 (1999).

24. Gary A. Abraham, *Review of Actions under President Clinton’s Executive Order on Environmental Justice*, 5 BUFF. ENVTL. L.J. 79, 95 (1997).

As the number of environmentally related Title VI complaints increased, the EPA promulgated guidance on how to comply with Title VI. In the EPA's 1998 Interim Guidance for Investigating Title VI Administrative Complaints (hereinafter "Interim Guidance"), revised in 2000, the EPA offered suggestions on how to proceed in compliance with Title VI.²⁵ When a complaint arises, the EPA Office of Civil Rights investigates the allegation.²⁶ The EPA then determines whether a disparate impact exists by evaluating a number of factors including any increase in pollution, any adverse impacts on the population, and whether the impact affected protected persons "at a disparate rate."²⁷ Once the EPA identifies a disparate impact, the agency or violator responsible must justify the allegation by showing that the action furthers "substantial, legitimate interests," as well as by showing the lack of other less discriminatory alternatives.²⁸ If this showing is made, the program can proceed even though it causes a disparate impact on a protected group. However, the burden lies with the accused, and not the accuser to demonstrate that there are no other less discriminatory alternatives and, that there is a substantial and legitimate reason for the accused pursuing the specific plan.

The effect of the Interim Guidance is that any program that creates a disparate impact is subject to the possible termination of EPA funding.²⁹ Although it does not provide any judicially enforceable remedies, the Interim Guidance still raises serious concerns for businesspeople.³⁰ At the time, one report stated that,

[S]tate environmental officials predict the new guidance will be a killer for brownfield development. "The guidance enables anyone with a typewriter to stop a permit from being issued . . . [and] goes against getting brownfields going, especially in places like Detroit." Hit by widespread plant closings in the 1970s and '80s, Detroit and other Midwestern cities have many lightly polluted sites that qualify for brownfield development.³¹

One question in particular is whether the threat of discrimination claims would stymie economic growth in minority communities. Potential loss of federal funding, as well as stunted economic growth are just a few of the underlying concerns remaining in the brownfield remediation process. Moreover, the EPA has yet to adopt any final guidance with respect to Title VI and its full effect on remediation initiatives.³²

25. U.S. ENVIRONMENTAL PROTECTION AGENCY, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998).

26. *Id.*

27. *Id.*

28. *Id.*

29. Worsham, *supra* note 22, at 650.

30. Mary H. Cooper, *Environmental Justice*, 8 CQ RESEARCHER 529, 529-52 (1998), <http://library.cqpress.com/cqresearcher/cqresrre1998061900>.

31. *Id.*

32. See generally U.S. Commission on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, 13-27, <http://www.usccr.gov/pubs/envjust/ej0104.pdf>

A. Brownfields and their Disparate Impacts on Poor and Minority Populations: Midwestern Examples

The impetus behind brownfield redevelopment was well intentioned at its inception. However, the ultimate effect of legislation often differs from its initial goals. Many concur that some brownfield programs create mixed and unexpected results or at least have the potential to do so.³³ Nonetheless, brownfield cleanup efforts have gained momentum across the United States.³⁴ Cooperation between land developers and communities resulted in the remediation of approximately 50,000 contaminated sites in the last decade alone.³⁵ Nonetheless, racial undertones embodied in economic and environmental data from current brownfield programs presents considerable obstacles to reaching equal treatment.

Much of the clamor to revise brownfield remediation policies and to curb these undesirable side effects emanates from public interests groups and environmental justice advocates. These organizations initially gained constituents in the 1980s, and then more aggressively during the 1990s.

President Clinton's mandate - that all federal agencies with an environmental mission must integrate environmental justice into their operations - further fueled the environmental justice movement, which still exists today.³⁶ Clinton's executive order created a new method of attack since agencies were expressly required to ensure that their policies and decisions did not have a disparate impact on minority and low-income populations. Crusaders for inner-city populations increasingly brought and won lawsuits under Title VI as applied to the EPA and the disparate impact of brownfield remediation projects on protected groups.³⁷ These crusaders argue that voluntary cleanup programs and community cooperation are more effective means to prevent the disparate impacts caused by brownfield policy.³⁸ Initially, this created a chilling effect, and slowed the redevelopment of many potential brownfield clean-up sites particularly among more cautious developers.³⁹ Other projects continued to progress without regard to Title VI suits when developers determined that the economic incentives still outweighed the risks of suit.⁴⁰

33. See, e.g., Flannery P. Collins, *The Small Business Liability Relief and Brownfields Revitalization Act: A Critique*, 13 DUKE ENVTL. L. & POL'Y F. 303, 327 (2003).

34. Biederman, *supra* note 4.

35. *Id.*

36. 59 Fed. Reg. 7,629.

37. See U.S. Commission on Civil Rights, *supra* note 32.

38. *Id.*

39. Hayden, *supra* note 23.

40. A main element of brownfield laws is to mitigate the risk by providing some level of indemnification to a owner of a redeveloped brownfield. (there needs to be support for both statements).

The analysis of the effects of brownfield policy goes well beyond the mere potential for lawsuits and other chilling effect. To decipher the effectiveness of current brownfield programs, one must look to both the economic and environmental impacts. The focus then is on whether the program promotes equality or inequality in its current form. The goal is to avoid disparate impacts to the fullest extent possible while maintaining a workable, efficient program at the implementation level. Ultimately, both environmental justice advocates and the government embrace this same goal, but with different means to the end.

1. Economic Impacts: Pre-Development Mapping

To understand the arguments of brownfield policy critics, both the economic effects of developed and undeveloped properties must be analyzed. Communities must establish effective financing packages to make projects feasible and bridge the gap between vacant or abandoned lots and the redevelopment phase.⁴¹ For example, Michigan has used brownfield tax credits as a part of financing packages to make developments more feasible.⁴² A brownfield tax credit will be paired with other conventional financing to fund the development.⁴³ Once redevelopment begins, the project will typically contribute positively to the surrounding community. Detailed planning and oversight can mitigate the negative effects of redevelopment. However, missteps at the local and state levels create the potential for both negative economic and discriminatory effects during the pre-development to post-development stages. Decisions during the pre-development stage are economically driven, whereas, the development and post-development stages focus on environmental impacts.⁴⁴

The potential for a disparate impact first arises before a developer selects a site for redevelopment. Some states, in an effort to jumpstart economic development, engage in widespread brownfield mapping.⁴⁵ This pre-development step targets and designates or “maps” a particular area for brownfield designation. In effect, the local brownfield authority or other state actor will label a property or section of the city as blighted.⁴⁶ The rationale behind this method is to open the doors for developers to seize the tax benefits and financing options available to the brownfields within the designated area.

41. David Czurak, *Developer Gets Tax Exemption*, 25 GRAND RAPIDS BUS. J. 9 (2007).

42. *Id.*

43. *Id.*

44. See Charles Bartsch & Barbara Wells, *Local Brownfield Financing Tools Structures and Strategies for Spurring Cleanup and Redevelopment* (2006), <http://www.nemw.org/Brownfield%20local%20financing%20tools.pdf>.

45. See, e.g., Phyllis E. Bross, *The Greening of New Jersey's "Brownfields" – As Viewed by the Department of Environmental Protection*, 9 FORDHAM ENVTL. L.J. 541 (1998).

46. Bartsch & Wells, *supra* note 44.

Research shows that this mapping technique can in fact have the opposite effect when developers do not act on the incentives and the properties remain vacant.⁴⁷ Not only are the brownfields not redeveloped, but surrounding properties also degrade because of the neighborhood's designation as a brownfield.⁴⁸ With large city sectors suffering from the stigma of dirty brownfields, the negative socioeconomic effects can be quite substantial. Again, these effects seemingly fall disproportionately on poor and minority populations, given that the majority of brownfields are located in minority communities.⁴⁹

Cleveland, Ohio is one city that used extensive brownfield mapping in an effort to encourage redevelopment. Cleveland, similar to Detroit, Michigan, lost close to 50% of its population between the 1950's and present day.⁵⁰ This population flight combined with manufacturing outsourcing left large sectors of the city abandoned.⁵¹ In an attempt to encourage development, the city designated many areas as brownfields. Unfortunately, the incentives were not sufficient to encourage redevelopment. Many of the properties remained blighted and stamped as brownfields.⁵² The lack of redevelopment in response to the brownfield mapping chilled inner city investment and neighborhood progress. Situations like this establish concrete evidence for critics that brownfield mapping programs can fail.

Taken in isolation, one might assume that the effects of brownfield mapping may equally effect both poor and affluent areas. However, a recent study shows that the increase in poverty and decrease in property values near brownfield designated properties fell largely upon those areas already stricken with poverty.⁵³ For each additional non-remediated brownfield property, surrounding property values decreased 11% for those located within five hundred feet of a brownfield.⁵⁴ Without redevelopment, the designations resulted in an increased rate of deterioration in the neighborhood. In Cleveland, developers simply avoided inner cities and were more apt to develop brownfields in affluent suburbs. The Cleveland example indicates that states should designate more financial resources for inner city brownfields than their suburban counterparts. When compared to suburban projects in Cleveland, the mapping technique created a statistically harsher, disparate impact on the inner city, minority population. With equal financing incentives, the developer will frequently choose the suburban route.

47. Mank, *supra* note 14, at 160.

48. Colin M. McNiece, *A Public Use for the Dirty Side of Economic Development: Finding Common Ground Between Kelo and Hathcock for Collateral Takings in Brownfield Redevelopment*, 12 ROGER WILLIAMS U. L. REV. 229, 245 (2006).

49. Mattheisen, *supra* note 18.

50. Haya El Nasser, *As Older Cities Shrink, Some Reinvent Themselves*, USA TODAY, Dec. 27, 2006, available at http://www.usatoday.com/news/nation/2006-12-26-shrinking-cities-cover_x.htm.

51. Nancey Green Leigh & Sarah L. Coffin, *Modeling the Brownfield Relationship to Property Values and Community Revitalization* (2002), http://cepm.louisville.edu/Pubs_WPapers/PDF_Docs/upe2002.pdf.

52. *Id.*

53. *Id.*

54. *Id.*

The effect of using sufficient incentives is evident in other cities across the Midwest. Illinois' sanctioning of development incentives has inspired some encouraging results. For example, a blighted, 155-acre area of Chicago, designated as a brownfield, was successfully redeveloped into a Ford Motor Company manufacturing facility.⁵⁵ This project alone created 1,400 jobs in the community.⁵⁶ Likewise, Michigan has seen brownfield designations lead to redevelopments that increased surrounding property values.⁵⁷

At first, Chicago and Cleveland's differing results between pre-development mapping programs seem puzzling. Both are Midwestern cities with a large population and industry base. However, the distinction lies within the macro approach to redevelopment. Chicago's approach vehemently targeted a specific community and matched incentives that made the project attractive and beneficial to both parties.

In contrast, Cleveland took an individualized approach by designating brownfields independent from other considerations within the surrounding neighborhoods. Due to the broad economic degradation in Cleveland's inner city, brownfield incentives were insufficient to entice new redevelopment. The targeted Cleveland neighborhoods were beyond the point of a compartmentalized recovery. Cleveland's neglect of community-wide involvement and planning led to failure, whereas embracing those same principles led to success in Chicago.

2. Environmental Impacts: Development and Post-Development Stages

Title VI complaints are more likely to occur in the environmental arena. In reality, many environmental effects are intertwined with the economic decisions made during the development process. Disparate impacts during development and post-development arise in two situations. First, where developers choose suburban properties for redevelopment, instead of their inner city counterparts, the undeveloped and polluted properties pose greater health risks to the inner city population. Second - and the focus of this analysis - is that properties that are remediated may exacerbate current conditions, spread contaminants through a hasty cleanup, or simply not embody a "green" reuse of the brownfield. Often, these environmental problems arise in poor and minority dominated areas.

One of the original intentions of brownfield programs was to decrease the environmental hazards within communities. This goal conflicts with the needs of the government and developer to expedite redevelopment of contaminated sites, to save on development costs, and to create job growth within the community.⁵⁸ Expedited redevelopment often focuses only on the redeveloped site and does not consider the community-wide effects. Although the development itself signifies progress, the

55. *Id.*

56. *Id.*

57. See Leigh & Coffin, *supra* note 51.

58. U.S. Commission on Civil Rights, *supra* note 32.

negative environmental effects may eventually outweigh the cosmetic and job-related improvements.⁵⁹ For example, if a brownfield is reclaimed for industrial purposes, the community will gain jobs but also see an increase in congestion and pollution. Developers should instead incorporate a holistic approach to redevelopment to mitigate these adverse environmental consequences. Often this means a mixed-use development. Even in that case, slack oversight of the cleanup may create long-term environmental risks to the community.⁶⁰ Relaxed environmental standards attract increased development at the expense of greater environmental risks.⁶¹ Once a developer receives liability protection, they do not have an incentive to exceed the lower standard. Studies have shown that these effects are particularly severe in poor minority communities protected by Title VI.⁶² White communities are less likely to sideline environmental health hazards, and are more likely to push for strict oversight functions as well as enforce harsher penalties than their minority counterparts.⁶³

Therefore, policymakers should consider the environmental impacts in addition to the economic impacts in a community. Since brownfields are predominantly located in poor and minority dominated neighborhoods, the EPA and state governments need to discourage inefficient developments that increase the pollution burden on these inner city populations.

3. Do the Economic and Health Effects Violate Title VI?

After considering these economic and environmental effects, the issue is whether there is a disparate impact on the Title VI protected class. As mentioned before, Title VI prohibits discrimination under “any program or activity receiving Federal financial assistance.”⁶⁴ Title VI implicates brownfields under this language since the EPA grants federal funds to state agencies to implement brownfields and other environmental programs. Any “program or activity,” including brownfield programs conducted by state and local agencies, fall within the scope of Title VI.⁶⁵ Further, brownfield policies and projects can neither intentionally discriminate nor have a discriminatory effect based on race, color, or national origin.⁶⁶

In a document entitled “The Brownfields Title VI Case Studies”, the EPA examined the effects of brownfield developments. According to the study,

59. *Id.*

60. *Id.*

61. Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL L.J. 3, 54-57 (1998).

62. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L. J. at S1-S12 (Sept. 1992).

63. See U.S. Commission on Civil Rights, *supra* note 32, at 25.

64. 42 U.S.C. § 2000d.

65. Paul D. Flynn, *Finding Environmental Justice Amidst Brownfield Redevelopment*, 19 VA. ENVTL. L.J. 463, 464-68 (2000).

66. 42 U.S.C. § 2000d.

brownfield projects did not give rise to any Title VI complaints.⁶⁷ The EPA repeatedly used this study to justify the lack of a relation between Title VI complaints and brownfields.⁶⁸

This study, however, is not persuasive or conclusive for several reasons. First, the brownfield sites selected for the study required a minority population of only 10%.⁶⁹ This sample size does not simulate a realistic situation in a city like Detroit, where the minority population exceeds 80%.⁷⁰ Secondly, the EPA encouraged widespread community involvement in the brownfield developments. Community involvement reduces the probability that Title VI complaints will arise.⁷¹ Meanwhile, the study does not account for the brownfield projects that do not proactively seek out community involvement. In addition, without the participation of environmental justice advocates, the average citizen may not consider the externalities associated with development that may create a disparate impact. Finally, the EPA's Interim Guidance encourages informal resolutions to Title VI complaints.⁷² Informal resolutions are likely because of the threat that the EPA may revoke financial support for project. It is unlikely that the brownfields studied did not create any Title VI effects; rather, they did not create any *documented* effects. Thus, the EPA's stance that brownfields have not resulted in any Title VI complaints is not determinative.⁷³

Besides the objective complaint numbers, a broader analysis of the brownfields demonstrates that the programs create a disparate impact. Economically, brownfields "promote the interests of higher-income groups more than those of the poor," and therefore, "increase[s] the degree of inequality in the distribution of real income."⁷⁴ This fact is often overlooked since "almost any development is an improvement over conditions of contamination and blight, especially if it includes jobs for local community residents" and the positive aspects overshadow the underlying negative impacts.⁷⁵

67. Fact Sheet on Title VI and Brownfields, *available at* <http://www.epa.gov/civilrights/t6brnflld.htm> (last visited Nov. 29, 2007).

68. *Id.*

69. Press Release, EPA, Environmental Justice Case Studies of Brownfield Redevelopment Sites, (June 11, 1999), *available at* <http://yosemite.epa.gov/opa/admpress.nsf/0/8D36E10F682244168525678D00719C69> (last visited Nov. 22, 2007).

70. *See generally*, U.S. Census Bureau Detroit Quick Facts, *available at* <http://quickfacts.census.gov/qfd/states/26/2622000.html> (last visited Jan. 2, 2008).

71. Flynn, *supra* note 65, at 235.

72. Alice M. Shanahan, *Permitting Justice: EPA's Revised Guidance for Investigating Title VI Administrative Complaints*, 7 ENVTL. LAW. 403, 424 (2001).

73. *See* Fact Sheet on Title VI and Brownfields, *supra* note 67.

74. Richard J. Lazarus, *Pursuing Environmental Justice: The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 796 (1993).—Need a pincite, where is the author quoting this material?

75. *Citizens' Report on Brownfields*, Ctr. for Pub. Env't Oversight & The Pac. Studies Ctr., r 3 (1999).

Even a positive economic development may create risks in the future. For example, a cleaner physical environment increases property value, which forces out people with few economic resources.⁷⁶ The result is gentrification of once poor, inner city neighborhoods. However, gentrification without a connection to government financing is only a social movement and thus does not implicate Title VI.

Nonetheless, the discriminatory result is the same. Gentrification displaces or otherwise affects a class of lower income earners by the decision to redevelop the brownfield; particularly when new, higher priced residential units enter the market.

A further negative economic impact, as mentioned earlier, arises with the application of Title VI through the EPA's Interim Guidance. The Interim Guidance may create a chilling effect on development and result in less inner city brownfield projects. Further, developers may favor outlying brownfield projects further away from the populace protected by Title VI to mitigate the risk of a complaint or denial by the EPA.⁷⁷ For instance, in Cleveland, brownfields are more likely to be developed in areas that have less than 20% poverty levels.⁷⁸ This statistically correlated phenomenon can be explained by a combination of economic conditions and Title VI risks. Even the threat of a Title VI complaint is sufficient to discourage development. Because Title VI complaints arise in lower income, poverty infused areas in need of redevelopment, the Title VI chilling effect creates a disparate impact.

These facts, taken aside from the EPA's own internal studies, support the idea that some brownfield programs do violate Title VI. Economically, developments in suburban areas receive greater oversight and are more successful than their inner city equivalents. From an environmental perspective, many brownfield projects fail to fully abate pollutants and risk further exposure to the surrounding population.⁷⁹ Interim Guidance does not provide enough certainty. Aside from voluntary activism, no enforcement mechanism exists to mitigate these disparate impacts.

B. The Way Forward, Changes to the Current Brownfield Approach

1. Past Attempts to Mitigate Title VI Complaints and Impacts

76. A. Myrick Freeman, *The Economics of Environmental Policy* 143 (1973); See also A. Dan Tarlock, *Western Water Law, Global Warming, and Growth Limitations*, 24 *LOY. L.A. L. REV.* 979, 1001, n.152 (1991).

77. Title VI – Resolving Uncertainty with Community Impact Statements, available at <http://www.cpeo.org/lists/brownfields/1998/msg00189.html> (last visited Nov. 15, 2007).

78. See Leigh & Coffin, *supra* note 51, at 12.

79. Seth Schofield, *In Search of the Institution in Institutional Controls: The Failure of the Small Business Liability Relief and Brownfields Revitalization Act of 2002 and the Need for Federal Legislation*, 12 *N.Y.U. ENVTL. L.J.* 946, 964 (2005).

Federal and state agencies are aware of the potential for Title VI violations and have continued to reform their brownfield development policies. In 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act (hereinafter the "Act").⁸⁰ Along with an increase in funding, the Act builds upon the EPA's prior Brownfields Program by clarifying liability limitations and providing more certainty to developers.⁸¹ However, changes are more likely to be successful at the local level where officials are familiar with the socio-economic make-up of particular neighborhoods and can make more informed development decisions. Several state level initiatives have recognized these locality advantages and reevaluated their policies accordingly. Enactment of state brownfield legislation, as discussed below, emphasize the state's crucial role in the implementation of the federal brownfield regulations.

Michigan's main implementation act is the Brownfield Redevelopment Financing Act.⁸² The Act addresses the economic feasibility of redevelopments. Thus far, officials have addressed Title VI issues on a more informal level. The Michigan Department of Environmental Quality held a workshop in 1999 with the intent to develop an environmental justice plan.⁸³ The workshop included a disparate impact subgroup and a community outreach subgroup to establish environmental justice policies that would effectively counteract the disparate impacts created by brownfield policy.⁸⁴

Illinois has similar programs. The state's Environmental Protection Act, for example, establishes funding for site cleanups and processes for brownfield redevelopment.⁸⁵ To protect against adverse environmental impacts, including unsafe levels of pollution, the state has established maximum levels of pollutants and implemented oversight of cleanups. Finally, to improve the quality of brownfield redevelopment and decrease adverse impacts, Illinois requires public participation in the remediation plans and development of brownfields.

Ohio has also enacted comprehensive financial incentives to encourage redevelopment.⁸⁶ In contrast to Michigan and Illinois, Ohio charges substantial fees to finance the brownfield program's administrative costs.⁸⁷ Even more striking is the lack of public participation requirements. Public participation in the brownfield

80. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118 (2002); H.R. 2869.

81. *Id.*

82. MICH. COMP. LAWS ANN. § 125.2651 et seq.

83. Hillary Gross, *Environmental Justice: A Review of State Responses*, 8 HASTINGS J. ENVTL. L. & POL'Y 41, 57-58 (2001-2002).

84. *Id.*

85. The Environmental Protection Act, 18 ILL. COMP. STAT §58 (1996).

86. Ohio Dep't of Dev., *Clean Ohio Revitalization Fund*, <http://www.odod.state.oh.us/ud/CORF.htm> (last visited Nov. 28, 2007).

87. The Region 5 Brownfield Summary indicates the fees for initial certification, laboratory certification, annual renewal fees, and other studies which amount to more than \$20,000 in administrative fees. See Region 5 Brownfield Summary, An Update from the States, at 83, available at http://www.epa.gov/swerosps/bf/pubs/bf_states_r5.pdf (last visited Feb. 22, 2008).

process is merely voluntary.⁸⁸ The lack of public participation contributes to a higher risk of Title VI complaints.⁸⁹

2. Avoiding Title VI Complaints with Successful Brownfield Programs

Agencies can employ a variety of techniques to improve the effectiveness of brownfield programs and decrease the potential for Title VI impacts. Encouraging public involvement, comprehensive planning, and program uniformity will create more effective brownfield programs.

Community involvement appears to be positively correlated with the success of projects across the Midwest.⁸⁹ For instance, in Chicago, a developer that failed to obtain a redevelopment permit, later succeeded in the application process when the “local residents and community advocated for his project.”⁹⁰ The same community involvement can also deter poorly conceived developments. In Detroit, community activists banded together and opposed a brownfield redevelopment viewed as a detriment to the community. The activists demanded “clean jobs” in order to prevent additional pollution from entering their neighborhood.⁹¹ The Chicago and Detroit examples demonstrate that community input can be essential for the brownfield authority or agency to fully evaluate the cumulative effects of a redevelopment project. Communities can assume a policing function and ensure that only well-conceived brownfield redevelopments materialize.

The EPA recognizes the importance of community involvement and has taken steps to engage the public in brownfield decisions and to improve their response to Title VI claims.⁹² A formal policy is the first step to derive equality from community based environmental and brownfield decisions. The EPA’s current policy allows the public to participate in environmental decisions like cleanups, remediation, permitting, and general brownfield discussions. The EPA accomplishes this goal by identifying interested persons, providing them with information and consulting with them.⁹³ While this process is not mandatory, it provides a framework for mitigating the potential discriminatory effects of brownfield redevelopments.

The EPA’s macro approach to community involvement is implemented on the local level.⁹⁴ Community based programs are successful in preventing and resolving Title VI complaints. These programs also build trust and relationships

88. *Id.*

89. *See e.g.,* Jennifer Felten, *Brownfield Redevelopment 1995-2005: An Environmental Justice Success Story?*, 40 REAL PROP. PROB. & TR. J. 679, 688 (2006).

90. *See* Citizens’ Report on Brownfields, *supra* note 75.

91. *Id.*

92. *See*, U.S. Environmental Protection Agency, Office of Environmental Justice, *The Model Plan for Public Participation*, EPA-300-K-00-001 (Feb. 2000).

93. *Id.*

94. *Id.*

between the citizens and local government. For example, Chicago has seen relationships stemming from Brownfield cooperation lead to community based enforcement of illegal dumping which in turn saves the city additional money and improves the community as a whole.⁹⁵

In addition to public involvement, agencies can improve upon other factors. These factors include cooperation among agencies,⁹⁶ defined judicial remedies,⁹⁷ and continuous and systematic reevaluations,⁹⁸ which can strengthen the current framework. While the risk of environmental and tort liability has a chilling effect on development, it is no longer a large contributor to Title VI claims. For many years, commercial lenders were hesitant when financing a Brownfield redevelopment.⁹⁹ The Small Business Liability Relief and Brownfields Revitalization Act¹⁰⁰ has created more certainty in this area. However, a reverse of this policy could be extremely detrimental to brownfield redevelopment. Federal funding for brownfield redevelopments must remain unabated to promote sustainable redevelopment in our communities.

The real concern lies with the implementing the brownfield programs. Fair implementation is necessary for brownfields to revitalize the community. Developments should not force low-income households out of their neighborhoods. Furthermore, the government should not turn a blind eye to a job creation and redevelopment if no underlying negative effects on a community exist. Attracting mixed use, and “clean industries” to Brownfield areas should be a primary goal.¹⁰¹

IV. CONCLUSION

Clearly, race and income are factors in brownfield decision-making. Even with the Title VI concerns that jeopardize the fairness and implementation of brownfield programs; brownfield redevelopment serves an important role at the economic and environmental levels. While Title VI impacts undoubtedly occur, brownfields often serve as a catalyst in communities. The ideal developments should “revitalize[e] neighborhoods, increase[e] city tax bases, and improve[e] the

95. See Citizens’ Report on Brownfields, *supra* note 75.

96. See *Brownfields Federal Partnership Action Agenda*, U.S. Env’tl. Prot. Agency, EPA 500 -F-02-151 (Nov. 2002). The EPA created a Brownfields Federal Partnership Action Agenda to encourage federal agencies to work together to assess, clean up, and find sustainable uses for brownfields.

97. A judicial remedy may be more appropriate than the EPA’s Interim Guidance. The Interim Guidance does not provide any incentive or clear adjudicative process to bring Title VI challenges. *Id.*

98. *Id.*

99. Charles Bartsch & Barbara Wells, *Financing Strategies for Brownfield Cleanup and Redevelopment*, 7 (2003), available at <http://www.nemw.org/BFfinancingredev.pdf> (last visited Nov. 15, 2007).

100. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

101. See U.S. Commission on Civil Rights, *supra* note 32, at 25.

environment.”¹⁰² However, current brownfield programs require reform to reach these goals more efficiently by minimizing Title VI disparate impacts. [1:1]

Community-wide involvement has proven to be a successful and preferable alternative to federally mandated rules. By avoiding macro level governing, communities can address projects on a case-by-case basis, while drawing their attention to local issues. Equality in enforcement and regulation is necessary at the local level to prevent flight of developers to already stable non-minority communities.¹⁰³ Liability shields for purchasers of contaminated properties are already in force and should remain.¹⁰⁴

There are fundamental flaws in the current brownfield system, which are inherent across many programs, including Cleveland. Inequality still exists and it underlies many brownfield redevelopments. While Title VI does not provide an adequate remedy for individuals in poor and minority communities, activism can lead to lessening the gap, to create not only development, but also an equally beneficial, nondiscriminatory development.

102. *Id.*

103. *Id.*

104. *See* Small Business Liability Relief and Brownfields Revitalization Act.